

**REMARKS**

The presented communication is responsive to the Office Action mailed September 10, 2008. A one-month Extension of Time is submitted herewith extending the period of reply from Saturday, December 10, 2008 up to and including Monday, January 12, 2009. A Request for Continued Examination is also submitted herewith.

Claims 13-16, 18, 20, 21 and 23-35 are rejected in the Action. Claims 13, 16, 21, 29, 32 and 35 are amended and no claims are canceled or added herein. Therefore, claims 13-16, 18, 20, 21 and 23-35 remain pending in the application. All claim amendments are supported by Applicants' originally filed disclosure. No new matter is added herein. Applicants set forth remarks relating to the Action below.

The Examiner rejected claims 29, 32 and 35 under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claims 29, 32 and 35 are amended herein to remove the recitations regarding the claimed spring/socket having "a first end and a second end." As recited in amended claims 29, 32 and 35, the claimed spring/socket includes a first hole and a second hole such that a fastener extending through each of the holes of the spring/socket secures the spring/socket to the second plate. Therefore, Applicants respectfully submit that the 35 U.S.C. 112, second paragraph rejection is overcome in light of the amendments made to claims 29, 32, and 35 and should be withdrawn.

Before addressing the claim rejections outlined in the Action based on what the Examiner considers as prior art, Applicants' undersigned attorney would first like to thank the Examiner for the opportunity of discussing the Action in a telephone interview on October 22, 2008. The substance of the

interview focused on U.S. Patent No. 5,895,428 to Berry ("Berry") and U.S. Patent No. 6,063,121 to Xavier et al. ("Xavier") in view of independent claims 13, 16, and 21.

In the Action, the Examiner rejected Claims 13, 16, 18, 20, 21, 23, 27, 28, 30, 31, 33 and 34 under 35 U.S.C. 102(b) as being clearly anticipated by U.S. Pat. No. 5,895,428 to Berry ("Berry"), claims 13, 16, 18, 20, 21, 23, 27, 29, 30, 32, 33 and 35 under 35 U.S.C. 102(b) as being clearly anticipated by U.S. Pat. No. 6,063,121 to Xavier et al. ("Xavier"), claims 14, 15 and 24-26 under 35 U.S.C. 103(a) as being unpatentable over Xavier in view of U.S. Pat. No. 3,867,728 to Stubstad et al. ("Stubstad"), claims 14, 15 and 24-26 under 35 U.S.C. 103(a) as being unpatentable over Berry in view of Stubstad, and claims 29, 32 and 35 under 35 U.S.C. 103(a) as being unpatentable over Berry in view of U.S. Pat. No. 5,893,889 to Harrington ("Harrington").

During the October 22 interview, the Applicants' undersigned representative sought to distinguish the spring/socket as claimed in independent claims 13, 16 and 21 in view of what the Examiner was referring to as the same in the cited references. For instance, in the Action, the Examiner opined that fitting 109 or fittings 105 + 109 read on the claimed spring/socket. During the interview, the Examiner requested that the claimed spring/socket be amended such that fitting 109 or fittings 105 + 109 in Berry do not read on the claimed spring/socket. While Applicants disagree that the claimed spring/socket reads on what the Examiner has referred to in Berry and Xavier in rejecting the claims, in order to progress the prosecution of the present application, Applicants have amended the claimed spring/socket to include the recitation that it is a resilient deformable spring/socket in order to provide even more description to this claimed element. Further, Applicants have amended the aforementioned independent claims to

include a recitation that the claimed ball or ball-shaped structure has a curved convex surface directed away from the inner surface of the first plate. As agreed to by the Examiner in the interview, whatever element the Examiner opined was the ball or ball-shaped structure in the cited references (Berry - spherical nut 13; Xavier - ball supporting member 42 + ball 46, or ball 46 by itself) does not have a curved convex surface directed away from the inner surface of the first plate as is recited in the amended independent claims 13, 16 and 21. Further still, as discussed in the interview, what the Examiner refers to as a spring/socket in the cited references is not monolithically formed (*i.e.*, single piece, rigidly fixed) as is the spring/socket disclosed in the present application and as claimed in amended claims 13, 16 and 21.

In light of the October 22 outlined above, Applicants respectfully submit amended independent claims 13, 16, and 21 are not anticipated by either Berry or Xavier because the cited references do not disclose or suggest an intervertebral spacer device wherein an inner surface of a first plate has a ball shaped structure extending therefrom, the ball shaped structure having a convex curve directed away from the inner surface of the first plate. Further, the cited references do not disclose or suggest a resilient deformable spring affixed to an inner surface of a second plate the spring being monolithically formed and having an opening for receiving and holding therein the ball shaped structure. For the foregoing reasons, independent claims 13, 16, and 21 are not anticipated by either Berry or Xavier. Claims 14, 15, 18, 20, and 27-29 depending from independent claim 13, claims 30-32 depending from independent claim 16, and claims 23-26 and 33-35 depending from claim 21 are also unanticipated, *inter alia*, from their dependence from unanticipated independent claims. A depending claim is necessarily narrower than the claim from which it depends.

Further, because neither Berry nor Xavier disclose or suggest any of the aforementioned amendments made to independent claims 13, 16, and 21, a *prima facie* case of obviousness cannot be made using the cited references. Therefore, amended independent claims 13, 16, and 21 are also unobvious in view of the cited references. For the foregoing reason, claims 14, 15 and 24-26 are unobvious over Xavier in view of Stubstad, claims 14, 15 and 24-26 are unobvious over Berry in view of Stubstad, and claims 29, 32 and 35 are unobvious over Berry in view of Harrington.

In view of the above, each of the presently pending claims in this application is believed to be in immediate condition for allowance. Accordingly, the Examiner is respectfully requested to withdraw the outstanding rejection of the claims and to pass this application to issue.

If, however, for any reason the Examiner does not believe that such action can be taken at this time, it is respectfully requested that he telephone Applicants' attorney at (908) 654-5000 in order to overcome any additional objections which he might have.

If there are any additional charges in connection with this requested amendment, the Examiner is authorized to charge Deposit Account No. 12-1095 therefor.

Dated: January 12, 2009

Respectfully submitted,

By 

William A. Di Bianca

Registration No.: 58,653

LERNER, DAVID, LITTENBERG,

KRUMHOLZ & MENTLIK, LLP

600 South Avenue West

Westfield, New Jersey 07090

(908) 654-5000

Attorney for Applicants